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No. 00-1214

In The

# Supreme Court of the United States

STATE OF ALABAMA,

*Petitioner,*

vs.

LEREED SHELTON,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

The statement of the "Question Presented" in the Petition is premised on a flawed analysis of *Argersinger vs. Hamlin*, 407 U.S. 25 (1972) and *Scott vs. Illinois*, 440 U.S. 367 (1979). It attempts to derive a standard from those decisions (expressed as "actual imprisonment") which does not encompass their full meaning. Both decisions make it clear that it is "deprivation of a person's liberty" that invokes the constitutional right to counsel at trial. See 407 U.S. at 37-38, 40; 440 U.S. at 370, 373. Actual imprisonment is only one form of deprivation of liberty. Further, *Scott* makes it clear that the right to counsel applies every time a defendant is "sentenced to a term of imprisonment". 440 U.S. at 373-74. The clear language of *Argersinger* and *Scott* makes no exception for sentences of imprisonment which are suspended on the condition of probation. With all of the restrictions and restraints, including delayed incarceration, that probation entails, probation is inherently a deprivation of liberty.

The sentencing order in this case shows the Respondent was actually sentenced to a term of imprisonment. Consequently, the question presented by this case is not as ingenuous as the statement of the "Question Presented" in the Petition. Rather, this case embraces the broader questions of whether a jail sentence imposed and suspended on the condition of probation is a sentence imposed within the meaning of *Scott vs. Illinois* and whether a sentence imposed and suspended on the condition of probation (and the onerous limits on conduct,

## QUESTION PRESENTED – Continued

behavior, and procedural rights that are an incident of probation under Alabama law) is a restraint on liberty within the meaning of *Argersinger vs. Hamlin* and *Scott vs. Illinois*.



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## STATEMENT OF THE CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED IN THE CASE

Each of the following are reproduced in the Appendix to this brief:

Alabama Constitution § 6

Alabama Code § 15-22-50 (1975)

Alabama Code § 15-22-52 (1975)

Alabama Code § 15-22-54(d)(1),(2) (1975)

Alabama Rules of Criminal Procedure 6.1

Alabama Rules of Criminal Procedure 27.2

Alabama Rules of Criminal Procedure 27.6(d)(1)

## STATEMENT OF THE CASE

The Respondent disagrees with the thrust and depth of the Statement of the Case in the Petition. While the Petition accurately summarizes the proceedings leading up to the Respondent's conviction, it fails to fully describe the actual sentence and, for reasons more fully discussed below, the significance of that sentence and its ramifications and consequences under Alabama law.

The full sense of the sentence imposed upon the Respondent can best be appreciated by reading the amended sentencing order of the trial court, which states in its essential part:

> Ordered by the Court that Defendant *be confined* in the Etowah County Detention Center for a period of thirty (30) days, sentence suspended

> and Defendant placed on two (2) years unsupervised probation. *As a condition of probation*, Defendant is ordered to pay court costs, a $500.00 fine, $25.00 as a Crime Victim's Assessment, and $516.69 restitution for the benefit of the victim, Kenny E. Campbell, all amounts ordered payment to the Clerk *immediately*. (Emphasis added)

(Record on Return to Remand, p.23.)

Under Alabama law, which defines the true nature and significance of this sentence, the sentencing of a defendant to imprisonment and suspension of the sentence on the condition of probation imposes a number of restraints on liberty. Most importantly, the sentence remains in force and effect in spite of the suspension and probation. See *Wray vs. State*, 472 So.2d 1119, 1121 (Ala. 1985); *Hamilton vs. State*, 43 Ala. App. 192, 186 So.2d 108, 114 (1965). A statute authorizes nine conditions of probation a sentencing court may impose, and allows a court to impose others at its discretion. See ALA. CODE § 15-22-52 (1975). Alabama law provides that the conditions of probation may be modified by a sentencing court without a hearing. See *A.R.Crim.P.* 27.2. Probation, of course, may be revoked and the sentence reinstated. See ALA. CODE § 15-22-54(d)(1) (1975). Under Alabama law probation may be revoked, and a probationer imprisoned, in a proceeding where the grounds for revocation need not be proven by legal evidence or beyond a reasonable doubt or even by a preponderance of evidence. See *A.R.Crim.P.*, 27.6 (d)(1); *Taylor vs. State*, 706 So.2d 1301, 1302 (Ala.Crim.App. 1997); *Powell vs. State*, 485 So.2d 379, 381 (Ala. 1986). In a probation revocation proceeding a probationer is not automatically entitled under Alabama law to counsel. See *Coon vs. State*, 675 So.2d 94, 95 (Ala.Crim.App. 1995).



## REASONS FOR DENYING THE WRIT

**I. The Petition is based on an incorrect analysis of *Argersinger vs. Hamlin*, 407 U.S. 25 (1972) and *Scott vs. Illinois*, 440 U.S. 367 (1979), and for that reason does not present a compelling reason to grant a writ of certiorari.**

The Petition should be denied because it is grounded on a plainly incorrect legal argument. Starting with its statement of the Question Presented, the Petition seeks to establish immediate imprisonment, rather than deprivation of liberty, as the trigger which quickens the right to counsel in a misdemeanor case. This attempt overlooks plain language in both the *Argersinger* and *Scott* decisions. The concluding paragraph of the *Argersinger* main opinion makes it clear that the ultimate distinction that mandates counsel in misdemeanor cases is State ordered deprivation of personal liberty:

> The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of "the guiding hand of counsel" so necessary when one's liberty is in jeopardy.

407 U.S. at 40.

The same principle is stressed in the *Scott* opinion in commenting on the *Argersinger* case:

> The Court in its opinion repeatedly referred to trials "where an accused is deprived of his liberty," id., at 32, and to "a case that actually leads to imprisonment even for a brief period," id., at 33. The Chief Justice in his opinion concurring in the result also observed that "any deprivation of liberty is a serious matter." Id., at 41.

440 U.S. 373.

Further, the *Scott* opinion concludes with this pronouncement:

> We therefore hold that the Sixth and Fourteenth Amendments of the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.

440 U.S. at 373-74.

Consequently, it is clear that the *Argersinger* and *Scott* cases do not limit the right to counsel in misdemeanor cases to immediate imprisonment cases but extend the protection to cases where there is a sentencing to a term of imprisonment or a deprivation of personal liberty.

The purpose of the right to counsel in the constitutional scheme is for the assurance of a fair trial. See *Powell vs. Alabama*, 287 U.S. 45, 68-69 (1932); *Gideon vs. Wainwright*, 372 U.S. 335, 344 (1963); *In Re: Gault*, 387 U.S. 1, 36 (1967). This purpose inculcates that the argument in the Petition for an immediate imprisonment standard is a flawed argument based on a flawed analysis. A fair trial can be assured only if counsel is provided before trial begins. As the opinion in *Argersinger* points out:



> Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.

407 U.S. at 40.

Consequently, from this clear holding in *Argersinger*, it is obvious that the judge trying a misdemeanor case must make a firm determination before trial of an unrepresented defendant begins that no term of imprisonment or no restraint of liberty will be imposed in that case. Otherwise the presence of counsel as a factor in a fair trial cannot be accommodated because the benefit of counsel cannot be afforded after the fact.

There was both sentencing to a term of imprisonment and deprivation of liberty in this case. The Respondent was clearly sentenced to thirty days of confinement ("that the Defendant be confined . . . "). There can be no debate that this was sentencing to a term of imprisonment. The term of imprisonment was suspended and the Petitioner placed on probation for two years, provided he "immediately" make certain monetary payments. The fact that imposing a sentence which is suspended on the condition of probation for an extended period is a restraint on liberty under Alabama law cannot be questioned. Under Alabama law a defendant remains under the original sentence (here 30 days of confinement) even though probation is granted. See *Wray vs. State*, 472 So.2d 1119, 1121

(Ala. 1985); *Hamilton vs. State*, 43 Ala. App. 192, 186 So.2d 108, 114 (1965). Probation is subject to conditions which may be any or all of nine statutory conditions and such other unspecified conditions as the sentencing judge may decide to impose. See ALA.CODE § 15-22-52 (1975). Under Alabama law the conditions of probation may be modified and more restrictions on liberty imposed by the sentencing court without a hearing. See *A.R.Crim.P.* 27.2. The conditions of probation may even include restrictions on such basic constitutional rights as speech, association, or assembly. See *Markley vs. State*, 507 So.2d 1043, 1052 (Ala.Crim.App. 1987).

The sentencing court has, of course, authority to revoke probation and to reinstate the suspended sentence. See ALA.CODE § 15-22-54(d)(1) and (2)(1975). Revocation of probation makes a suspended sentence merely delayed imprisonment. In a probation revocation proceeding under Alabama law the State is not required to prove the grounds for revocation by legal evidence or beyond a reasonable doubt. Hearsay is admissible and the standard of proof is the reasonable satisfaction standard. See *A.R.Crim.P.*, 27.6(d)(1); *Powell vs. State*, 485 So.2d 379, 381 (Ala. 1986); *Taylor vs. State*, 706 So.2d 1301, 1302 (Ala.Crim.App. 1997). The procedural safeguards of a trial do not stand between a probationer and imprisonment.

If being immediately incarcerated in a penal facility, as advocated by the Petition, is the only basis for invoking the right to counsel in misdemeanor cases this leaves a large gap in the constitutional ideal of *Argersinger*, *Scott*, and other decisions that no defendant be incarcerated who was compelled to go to trial without the benefit of



counsel. Under those decisions a judge trying a misdemeanor case clearly must determine in advance of trial that the defendant will suffer no imprisonment before a trial of an unrepresented defendant can take place. A judge cannot make the firm determination there will be no imprisonment if he reserves the right to sentence to a suspended sentence and probation. A suspended sentence and probation can amount to merely delayed imprisonment, or imprisonment by indirection. If the rule advocated by the Petition were adopted the constitutional right to counsel could easily be by-passed and a defendant incarcerated following trial or a guilty plea without counsel through the mere expedient, which could well be a ruse or pretense, of giving a suspended sentence and probation and subsequently revoking probation. Approval of such a procedure would amount to approval of a preference for form over substance, which has never been the standard for accommodating constitutional rights.

For the reasons discussed, the Petition in this case mischaracterizes the true holding in the *Argersinger* and *Scott* cases and advocates a standard that is clearly inconsistent with the rationale of those cases. The Petition should be denied as not presenting a compelling reason for issuance of a writ under Supreme Court Rule 10 because it seeks relief that is clearly inconsistent with established constitutional principles.

**II. The State court decision could have been based on State law rather than Federal law, and therefore the Petition does not present a compelling reason for issuance of a writ of certiorari.**

Notwithstanding the rules articulated in the more recent decisions of this Court for finding discretionary jurisdiction when there is a question of whether State or Federal law was the basis for a State court decision (such as *Arizona vs. Evans*, 514 U.S. 1 [1995] and *Michigan vs. Long*, 463 U.S. 1032 [1983]), certiorari remains a matter of discretion which should only be granted for "compelling reasons". SUP.CT.R.10. This Court retains the discretionary authority to decline jurisdiction and deny certiorari if a petition does not demonstrate a compelling reason.

If a State court decision could properly rest on State law, even if the State court decision cited Federal law as authority, this fact shows an absence of a compelling reason as required by Rule 10. This case is such a case. Although the decision of the Alabama Supreme Court discusses and relies on Federal constitutional principles and decisions, the decision could just as easily have rested solely upon Alabama law. The Alabama Constitution guarantees the right to counsel in criminal prosecutions. See ALA. CONST. § 6 (1901). Further, the Alabama Rules of Criminal Procedure, which have been in effect in Alabama since January 1, 1991, have explicit requirements for counsel and the procedure by which counsel will be provided or can be waived. See *A.R.Crim.P.* 6.1. The State law provisions would have required counsel for the Respondent, or a valid waiver of counsel, in this case.



This case, as is apparent from the opinion of the Alabama Supreme Court, primarily involved the question of whether the Respondent was properly notified of his right to counsel and effectively waived it under Alabama law, not a question of indigency and the right to appointed counsel. The Alabama Supreme Court decided there had not been a valid notice and a valid waiver, citing primarily State precedents (See Petitioner's Exhibit 35-36). This shows the decision the Petition seeks to review possibly involved an inter-relationship between State procedural and substantive rights and Federal rights (see *Duncan vs. Tennessee*, 405 U.S. 127 [1972]), but could clearly have been based on State law. This circumstance shows a lack of a compelling reason, and is an additional reason for denying the Petition in this case.

## CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests the Court to deny the Petition.

Respectfully submitted,

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## APPENDIX

Alabama Constitution §6

**Sec. 6. Rights of persons in criminal prosecutions generally; self-incrimination; due process of law; right to speedy, public trial; change of venue.**

That in all criminal prosecutions, the accused has a right to be heard by himself and counsel, or either; to demand the nature and cause of the accusation; and to have a copy thereof; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to testify in all cases, in his own behalf, if he elects so to do; and, in all prosecutions by indictment, a speedy, public trial, by an impartial jury of the county or district in which the offense was committed; and he shall not be compelled to give evidence against himself, nor be deprived of life, liberty, or property, except by due process of law; but the legislature may, by a general law, provide for a change of venue at the instance of the defendant in all prosecutions by indictment, and such change of venue, on application of the defendant, may be heard and determined without the personal presence of the defendant so applying therefor; provided, that at the time of the application for the change of venue, the defendant is imprisoned in jail or some legal place of confinement.

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Alabama Code §15-22-50 (1975)

**§ 15-22-50. Authority of circuit and district courts to suspend sentence and place convicted person on probation.**

Circuit courts and district courts, subject to the provisions and conditions hereinafter provided, may suspend execution of sentence and place on probation any person convicted of a crime in any court exercising criminal jurisdiction. The court shall have no power to suspend the execution of sentence imposed upon any person who has been found guilty and whose punishment is fixed at death or imprisonment in the penitentiary for more than 15 years. Except as provided in the preceding sentence, the court, after a plea of guilty, after the turning of a verdict of guilty by the jury or after the entry of a judgment of guilty by the court, may suspend execution of sentence and place the defendant on probation, or may impose a fine within the limits fixed by law and also place the defendant on probation. (Acts 1939, No. 278, p. 434; Code 1940, T. 42, § 19; Acts 1955, No. 480, p. 1093; Acts 1975, No. 1205, § 10-101; Acts 1985, 2nd Ex. Sess., No. 85-905, p. 177, § 2.)

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Alabama Code §15-22-52 (1975)

**§ 15-22-52. Conditions of probation.**

The court shall determine and may at any time modify the conditions of probation and may include among them the following or any other conditions. Such conditions may provide that the probationer shall:



(1) Avoid injurious or vicious habits;

(2) Avoid persons or places of disreputable or harmful character;

(3) Report to the probation officer as directed;

(4) Permit the probation officer to visit him at his home or elsewhere;

(5) Work faithfully at suitable employments as far as possible;

(6) Remain within a specified place;

(7) Pay the fine imposed or costs or such portions thereof as the court may determine and in such installments as the court may direct;

(8) Make reparation or restitution to the aggrieved party for the damage or loss caused by his offense in an amount to be determined by the court; and

(9) Support his dependents to the best of his ability. (Acts 1939, No. 278, p. 434; Code 1940, T. 42, § 22.)

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Alabama Code §15-22-54(d) (1), (2) (1975)

**§ 15-22-54. Period of probation; termination of probation upon showing of substantial compliance; arrest and disposition of person violating terms of probation.**

(1) If the defendant violates a condition of probation or suspension of execution of sentence, the court,

after a hearing, may implement one or more of the following options:

a. Continue the existing probation or suspension of execution of sentence.

b. Issue a formal or informal warning to the probationer that further violations may result in revocation of probation or suspension of execution of sentence.

c. Conduct a formal or informal conference with the probationer to reemphasize the necessity of compliance with the conditions of probation.

d. Modify the conditions of probation or suspension of execution of sentence, which conditions may include the addition of short periods of confinement.

e. Revoke the probation or suspension of execution of sentence.

(2) If the court revokes probation, it may, after a hearing, impose the sentence that was suspended at the original hearing or any lesser sentence, including any option listed in subdivision (1).

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Alabama Rules of Criminal Procedure 6.1

**RULE 6.1 RIGHT TO COUNSEL; WAIVER OF RIGHT TO COUNSEL**

**(a) Right to Counsel.** A defendant shall be entitled to be represented by counsel in any criminal proceedings held pursuant to these rules and, if indigent,



shall be entitled to have an attorney appointed to represent the defendant in all criminal proceedings in which representation by counsel is constitutionally required. The right to be represented shall include the right to consult in private with an attorney or the attorney's agent, as soon as feasible after a defendant is taken into custody, at reasonable times thereafter, and sufficiently in advance of a proceeding to allow adequate preparation therefor.

**(b) Waiver of Right to Counsel.** A defendant may waive his or her right to counsel in writing or on the record, after the court has ascertained that the defendant knowingly, intelligently, and voluntarily desires to forgo that right. At the time of accepting a defendant's waiver of the right to counsel, the court shall inform the defendant that the waiver may be withdrawn and counsel appointed or retained at any stage of the proceedings. When a defendant waives the right to counsel, the court may appoint an attorney to advise the defendant during any stage of the proceedings. Such advisory counsel shall be given notice of all matters of which the defendant is notified.

If a nonindigent defendant appears without counsel at any proceeding after having been given a reasonable time to retain counsel, the cause shall proceed. If an indigent defendant who has refused appointed counsel in order to obtain private counsel appears without counsel at any proceeding after having been given a reasonable time to retain counsel, the court shall appoint counsel unless the indigent defendant waives his right under this rule. If the indigent defendant continues to refuse appointed counsel, the cause shall proceed.

**(c) Withdrawal of Waiver.** A defendant may withdraw a waiver of the right to counsel at any time but will not be entitled to repeat any proceeding previously held or waived solely on the grounds of the subsequent appointment or retention of counsel.

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Alabama Rules of Criminal Procedure 27.2

## RULE 27.2 MODIFICATION AND CLARIFICATION OF CONDITIONS AND REGULATIONS

The sentencing court, with or without a hearing, may modify or clarify any condition or regulation imposed by it and any instructions issued by a probation officer. A probation officer may modify or clarify any instructions which the officer has issued. A probationer or a probation officer, at any time prior to absolute discharge, may request the sentencing court to modify or to clarify any condition or regulation. The sentencing court may, where appropriate, hold a hearing on such request. A written copy of any order of modification or clarification shall be given to the probationer, following which the probationer shall have ten (10) days to request a hearing on said order of modification or clarification.

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Alabama Rules of Criminal Procedure 27.6(d) (1)

## RULE 27.6 REVOCATION OF PROBATION

**(d) Nature of the Hearing.**

(1) The judge must be reasonably satisfied from the evidence that a violation of the conditions or regulations of probation or the instructions occurred. Each party shall have the right to present evidence and the right to confront and to cross-examine adverse witnesses who appear and testify in person. The court may receive any reliable, relevant evidence not legally privileged, including hearsay.

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